Nos. 03-184 & 03-1034

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CLAUDE M. BALLARD, ET UX., *Petitioners*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

ESTATE OF BURTON W. KANTER, ET AL., *Petitioners*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

On Writs of Certiorari to the United States Courts of Appeals for the Seventh and Eleventh Circuits

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BRIEF AMICUS CURIAE OF THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

KAREN R. HARNED
ELIZABETH A. GAUDIO
NATIONAL FEDERATION
OF INDEPENDENT BUSINESS
LEGAL FOUNDATION
1201 F Street, N.W.
Suite 200
Washington, D.C. 20004
(202) 554-9000

H. CHRISTOPHER BARTOLOMUCCI
Counsel of Record
STEPHANIE L. BROOKER
JESSICA L. ELLSWORTH
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5810

Counsel for Amicus Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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BRIEF AMICUS CURIAE OF THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST OF AMICUS CURIAE[1]

The National Federation of Independent Business Legal Foundation ("NFIB Legal Foundation")—a nonprofit public interest law firm established to protect the rights of America's small business owners—is the legal arm of the National Federation of Independent Business ("NFIB"), the Nation's oldest and largest organization dedicated to representing the interests of small business owners throughout all 50 states. The approximately 600,000 NFIB members own a wide variety of small businesses, including family farms, neighborhood retailers, service companies, and technology manufacturers.

The secretive process employed by the Tax Court is of concern to the NFIB Legal Foundation and the members of the NFIB. That process, and the court of appeals decisions below upholding it, raise serious questions about the actual and perceived fairness of Tax Court adjudications and the ability of small businesses effectively to contest disputes over tax liability in that court. The NFIB Legal Foundation supports the simplification of the process for determining and complying with tax obligations. The Tax Court's secretive handling of STJ reports, however, makes the process for adjudicating tax disputes more complicated and less transparent.

The NFIB Legal Foundation, or the NFIB itself, has filed briefs *amicus curiae* in prior cases of this Court affecting the interests of small business owners at both the petition and merits stages. *See Walters* v. *Metropolitan Educ. Enters.*,

[1] This brief was authored by Hogan & Hartson L.L.P., which serves as counsel for *amicus curiae* in this case. Pursuant to this Court's Rule 37.6, we note that Hogan & Hartson has represented the *Kanter* petitioners in other, non-litigation matters. Hogan & Hartson has not served as counsel for those parties in this case, however, and none of the Hogan & Hartson attorneys who have represented the Kanter family authored any part of this brief. Furthermore, no person or entity other than *amicus curiae* or Hogan & Hartson made a monetary contribution to the preparation and submission of this brief.

Inc., 519 U.S. 202 (1997) (merits stage); *Pierce* v. *Underwood*, 487 U.S. 552 (1988) (same); *Marshall* v. *Barlow's Inc.*, 436 U.S. 307 (1978) (same); *Deaton* v. *United States*, 124 S. Ct. 1874 (2004) (petition stage); *McNab* v. *United States*, 124 S. Ct. 1406 (2004) (same); *Gross* v. *Commissioner*, 537 U.S. 827 (2002) (same); *Walters* v. *Metropolitan Educ. Enters., Inc.*, 516 U.S. 1171 (1996) (same).

This brief is filed with the written consent of all parties pursuant to this Court's Rule 37.3(a); the requisite consent letters have been filed with the Clerk.

INTRODUCTION

The central issue in this case is whether the United States Tax Court's secretive handling of reports filed by its Special Trial Judges under Tax Court Rule 183 comports with the Due Process Clause of the Fifth Amendment.

Congress has authorized the Chief Judge of the Tax Court to "appoint Special Trial Judges who shall proceed under such rules and regulations as may be promulgated by the Tax Court." 26 U.S.C. § 7443A(a). Rule 183 provides that, following the conduct of a trial by an STJ, the STJ "shall submit a report, including findings of fact and opinion, to the Chief Judge," who will assign the case to a Judge or Division of the Tax Court. Tax Ct. R. 183(b). The rule also provides that the STJ's report—including the findings of fact therein—"shall be presumed to be correct," Tax Ct. R. 183(c), and given deference by the Judge or Division to which it is assigned. *See id.* ("Due regard shall be given to the circumstance that the [STJ] had the opportunity to evaluate the credibility of witnesses"); *see also Freytag* v. *Commissioner*, 501 U.S. 868, 874 n.3 (1991) (STJ's factual findings are reviewed by a Tax Court Judge under a "deferential standard"). Subject to those constraints, the Judge or Division to which the case is assigned may adopt, modify, or reject the STJ's report in whole or in part; receive additional evidence; order oral argument; or recommit the report with instructions. *See* Tax Ct. R. 183(c).

The practice of the Tax Court is to withhold the STJ's report from view. Neither the taxpayer nor a reviewing court of appeals ever sees the STJ's report, and that report is not made part of the record of the Tax Court's decision. And in those cases in which the Tax Court rejects the STJ's "presumed to be correct" findings, that fact goes undisclosed. Instead, the STJ prepares a revised report which the Tax Court adopts as its opinion—without ever revealing that the STJ's original findings were changed. As explained below, this secretive process is inconsistent with the Constitution's assurance of due process of law.

SUMMARY OF ARGUMENT

The Tax Court's failure to make the STJ's report available to a reviewing court of appeals violates the right to due process on appeal. The courts of appeals review decisions of the Tax Court for clear error, and the central feature of clear-error review is deference to the credibility judgments of the factfinder. Consistent with that approach, Tax Court Rule 183(c) provides that the STJ's findings of fact are "presumed to be correct" and that "[d]ue regard" shall be given to the STJ's determinations of witness credibility. The Tax Court's secretive process, however, impedes clear-error review by preventing the court of appeals from assessing whether the Tax Court gave proper deference to the STJ's factfinding and credibility determinations.

Due process also requires disclosure of the STJ's report on appeal because that document has legal effect. Under Rule 183, the STJ is required to prepare a report, and the Tax Court is required both to presume the correctness of the STJ's findings of fact and to give deference to the STJ's credibility determinations. The Rule 183 report thus has a legally-operative effect upon the Tax Court's ultimate decision. Underscoring this conclusion is *Freytag*, in which this Court held that STJs exercise significant governmental authority and rejected the Commissioner's contrary argument that STJs are mere "aides" of the Tax Court.

The three-part test of *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), confirms that, as a matter of due process, STJ reports must be available to a reviewing court of appeals. First, the private interests at stake in a Tax Court case clearly are significant; in this case, for example, a taxpayer was found liable for civil tax fraud. Second, the Government has no readily apparent interest in denying to a reviewing court of appeals an STJ's report—which Tax Court rules already require STJs to prepare and submit to the Tax Court. Third, the Tax Court's refusal to release the STJ's report increases the risk of an erroneous deprivation of the taxpayer's property interest by impairing the court of appeals' ability properly to review the facts found by the Tax Court.

Transparency and openness in the adjudicatory process are essential to the actual and perceived fairness of the judicial system. Yet the Tax Court refuses to disclose the conclusions of its initial factfinders. In so doing, the Tax Court stands alone. Unlike STJ reports, the initial findings of magistrate judges, bankruptcy judges, and administrative law judges are part of the record on review.

The serious due process question raised by the Tax Court's secretive process can, however, be avoided by construing 26 U.S.C. §§ 7459(b) and 7461(a) to require disclosure of STJ reports. The former states that "all reports of the Tax Court" are "public records" while the latter requires the Tax Court to "report in writing all its findings of fact, opinions, and memorandum opinions." Pursuant to the doctrine of constitutional doubt, these statutes should be construed to mandate disclosure of the STJ's report, thus obviating the substantial issue of due process that would otherwise arise from the Tax Court's practice of withholding those reports from reviewing courts of appeals.

ARGUMENT

I. APPELLATE REVIEW OF TAX COURT DECISIONS WITHOUT ACCESS TO THE STJ'S REPORT VIOLATES DUE PROCESS.

The Due Process Clause of the Fifth Amendment guarantees that "[n]o person shall be * * * deprived of life, liberty, or property, without due process of law." U.S. Const., amend. V. "[T]he Due Process Clause, like its forbear in the Magna Carta, was intended to secure the individual from the arbitrary exercise of the powers of government." *Daniels* v. *Williams*, 474 U.S. 327, 331 (1986) (internal citation and quotation marks omitted). "By requiring the government to follow appropriate procedures when its agents decide to 'deprive any person of life, liberty, or property,' the Due Process Clause promotes fairness in such decisions." *Id.*

"Because exaction of a tax constitutes a deprivation of property," procedures for the adjudication of tax liability must "satisfy the commands of the Due Process Clause." *McKesson Corp.* v. *Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 36 (1990). Accordingly, a federal taxpayer, whether an individual or a business, has a constitutional right to a fair process for resolving tax disputes with the Internal Revenue Service. *See id.* at 39 (government must afford taxpayers "a fair opportunity to challenge the accuracy and legal validity of their tax obligation"); *Turner* v. *Wade*, 254 U.S. 64, 67-68 (1920) (taxpayer entitled to adequate process for challenging "the validity of a tax and the amount thereof").

Like the procedures governing the conduct of a trial or other initial level of adjudication, "the procedures used in deciding appeals must comport with the demands" of the Due Process Clause. *Evitts* v. *Lucey*, 469 U.S. 387, 393 (1985). Although there may be no constitutional right to appeal the decisions of the Tax Court, because Congress determined that taxpayers should have a statutory right to do so, *see* 26 U.S.C. § 7482(a)(1), the Tax Court cannot utilize a process that forecloses meaningful appellate review consistent with

due process. And as explained below, the Tax Court's refusal to include the STJ's report in the record on appeal precludes fair and accurate appellate review.

A. Appellate Review For Clear Error Requires Access To The STJ's Report.

The twelve regional courts of appeals review decisions of the Tax Court "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury." 26 U.S.C. § 7482(a)(1); *see Freytag*, 501 U.S. at 891. Thus, courts of appeals review the Tax Court's factual findings for clear error. *Commissioner* v. *Duberstein*, 363 U.S. 278, 290-291 (1960); *see, e.g.*, *Andantech L.L.C.* v. *Commissioner*, 331 F.3d 972, 976 (D.C. Cir. 2003) (citing *Duberstein*); *Ballantyne* v. *Commissioner*, 341 F.3d 802, 807 (8th Cir. 2003) (same).[2]

The cornerstone of clear-error review is deference to the initial factfinder's opportunity to observe witnesses first-hand and to make credibility determinations. As this Court has explained, "[t]rial judges have the unique opportunity to consider the evidence in the living courtroom context, while appellate judges see only the cold paper record." *Gasperini* v. *Center for Humanities, Inc.*, 518 U.S. 415, 438 (1996) (internal citations and quotation marks omitted). "Face to face with living witnesses the original trier of fact holds a position of advantage" from which, in the case of the STJ, both the Tax Court Judge and appellate judges "are excluded." *United States* v. *Oregon State Med. Soc'y*, 343 U.S. 326, 339 (1952) (quotation marks and citation omitted); *see also Holiday* v. *Johnson*, 313 U.S. 342, 352 (1941) ("One of the essential elements of the determination of crucial facts is the weighing and appraising of testimony.").

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[2] " 'A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.' " *Duberstein*, 363 U.S. at 291 (quoting *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948)).

When findings are based on determinations regarding the credibility of witnesses, the appellate court owes "even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." *Anderson* v. *City of Bessemer City, N.C.*, 470 U.S. 564, 575 (1985) (citing *Wainwright* v. *Witt*, 469 U.S. 412 (1985)); *see also Webb* v. *Commissioner*, 394 F.2d 366, 380 (5th Cir. 1968) (noting the importance of observation of witness in Tax Court proceeding and deferring to the "benefit of live testimony where the demeanor of the witnesses would be gauged and evaluated").

This Court has stressed that determining "the weight and credibility of the evidence is the special province of the trier of fact." *Inwood Labs., Inc.* v. *Ives Labs., Inc.*, 456 U.S. 844, 856 (1982). Moreover, "[t]he rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise." *Anderson*, 470 U.S. at 574-575.

In requiring that the STJ's factfinding shall be "presumed to be correct" and insisting upon "[d]ue regard" for the STJ's credibility determinations, Tax Court Rule 183(c) mirrors the standard for appellate review of findings of fact from district courts. Federal Rule of Civil Procedure 52(a) states that, in reviewing a trial judge's factual findings, "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses" and provides that such findings shall be reviewed only for clear error. *See Inwood Labs.*, 456 U.S. at 855 (Rule 52(a) "recognizes and rests upon the unique opportunity afforded the trial court judge to evaluate the credibility of witnesses and to weigh the evidence.") (citing *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969)).[3]

[3] The importance of seeing a witness in making a credibility determination is also reflected in Federal Rule of Civil Procedure 63, which provides that when a judge is no longer able to proceed with a hearing or trial that has commenced, the successor judge shall recall any witness whose testimony is material and disputed at the request of a party.

Disregarding this Court's cases and pronouncements on the importance of credibility determinations and the critical vantage point of the initial factfinder in making credibility determinations—as well as its own rule—the Tax Court refuses to permit appellate courts to review the STJ's report. In so doing, the Tax Court precludes a constitutionally proper appeal because the centerpiece of clear-error review is deference to the credibility determinations and findings of the judicial officer who actually observed the witnesses. Due to the Tax Court's secretive process, an appellate court is left to review a credibility finding with the same degree of deference whether that finding was made by the Tax Court based on a cold record or by the STJ who presided over the trial. The Tax Court's decision to keep the STJ report secret also prevents an appellate court from determining if the Tax Court followed its own rules. Due process requires the Tax Court to follow its self-imposed rules and to create a record adequate to confirm whether it has done so. *See Giacco* v. *State of Pennsylvania*, 382 U.S. 399, 403 (1966) ("Certainly one of the basic purposes of the Due Process Clause has always been to protect a person against having the Government impose burdens upon him except in accordance with the valid laws of the land."). Only when the record for appellate review includes the findings of the initial factfinder, instead of merely those findings as filtered through a Tax Court Judge, can appellate review be fair and meaningful.

The refusal of the Tax Court to permit appellate court access to the STJ report implicates due process in two ways. First, even though due process mandates that factfinding not take place by proxy, the Tax Court Judge (who has not heard the witnesses) may, as alleged in this case, overturn the STJ's findings and credibility judgments. The Tax Court's secret process does not permit the appellate court to evaluate that reversal. Second, the Tax Court Judge may simply accept the

STJ's findings without undertaking the review required by Tax Court Rule 183(c). *Cf. Erhard* v. *Commissioner*, 46 F.3d 1470, 1476 (9th Cir.) ("Indeed, permitting the litigants to file objections to the special judge's report might well decrease the danger that the tax court will simply endorse the report without review.") (citation omitted), *cert. denied*, 516 U.S. 930 (1995). Either of these alternatives offends due process.

In order to review the Tax Court's factual findings for clear error, the appellate court must know the genesis of those factual findings. Although the Tax Court opinion states that it "agrees with and adopts the opinion of the Special Trial Judge" (App. to *Kanter* Pet. at 98a), and the STJ's *opinion* contains findings of fact, those findings may completely reverse the initial findings of fact that Tax Rule 183(b) requires to be contained in the STJ's *report*. And by keeping the original STJ report under wraps, neither the individual taxpayer nor the appellate court knows whether the crucial factual determinations on credibility and other issues contained in the Tax Court-adopted STJ opinion are the same or different from the factual findings in the STJ's report. If the findings are different, neither the taxpayer nor the appellate court knows if or how the Tax Court complied with the mandate of Tax Court Rule 183(c) to give "[d]ue regard" to the fact that the STJ "had the opportunity to evaluate the credibility of witnesses" and that the STJ's findings of fact in the report "shall be presumed to be correct." Tax Ct. R. 183(c). While the Tax Court opinion gives the impression that the STJ opinion is the STJ report,[4] there is simply no way to know whether, how, and why the Tax Court opinion modifies or reverses the factual findings in the STJ report

[4] In fact, both Courts of Appeals in the underlying cases specifically assumed that the STJ report and the STJ opinion were the same document. *See Ballard* v. *Commissioner*, 321 F.3d 1037, 1040 (11th Cir. 2003) ("Judge Dawson issued the opinion of the Tax Court in which the Tax Court both approved of and adopted Special Trial Judge Couvillion's *report*.") (emphasis added); *Estate of Kanter* v. *Commissioner*, 337 F.3d 833, 840-841 (7th Cir. 2003).

without access to the report itself. Appellate review on such terms is inadequate. *Cf. West Ohio Gas Co.* v. *Public Utils. Comm'n of Ohio*, 294 U.S. 63, 69 (1935).[5]

Because no Tax Court Judge is present at a trial before an STJ, the STJ is the exclusive finder of fact with respect to evaluating the credibility of witnesses. Rule 183(c) indicates that in the Tax Court, as in every other adjudicative forum, an initial factfinder's credibility assessments should not be second-guessed by those who were not present. *See Morgan* v. *United States*, 298 U.S. 468, 481 (1936) ("The one who decides must hear"). Live testimony provides the STJ access to nuances in a witness's physical reactions, demeanor, and tone of voice that cannot be gleaned from merely reading the transcript. In *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), in which the Court evaluated a procedure that prevented welfare recipients from appearing personally before the official who actually determined eligibility, the Court said that "[p]articularly where credibility and veracity are at issue, * * * written submissions are a wholly unsatisfactory basis for decision." *Id.* at 269. Likewise, the cold record is a wholly unsatisfactory basis for the Tax Court's credibility determinations, and meaningful appellate review depends on knowing what was the basis for the credibility determination.

Additionally, this Court has recognized the importance of weighing the agreement (or lack thereof) between lower courts on factual findings. "That great weight is to be given to the findings of fact by the two lower courts is a rule of wisdom in the exercise of the reviewing power of this

[5] The concern that the Tax Court Judge will fail to give the proper deference and presumption of correctness to the STJ's credibility determinations and factual findings is heightened by the fact that STJs lack the guarantees of judicial independence enjoyed by Article III judges. *See Freytag*, 501 U.S. at 912 (Scalia, J., concurring in part and concurring in the judgment) (STJs "lack life tenure; their salaries may still be diminished; they are still removable by the President"). As explained below, *see infra* at 13, this observation does not equate to a determination that STJs are mere "aides" or "staff" of the Tax Court.

Court." *Offutt* v. *United States*, 348 U.S. 11, 15 (1954); *see also Easley* v. *Cromartie*, 532 U.S. 234, 242 (2001) ("Where an intermediate court reviews, and affirms, a trial court's factual findings, this Court will not 'lightly overturn' the concurrent findings of the two lower courts.") (quoting *Neil* v. *Biggers*, 409 U.S. 188, 193 n.3 (1972)); *Corn Prods. Refining Co.* v. *Commissioner*, 350 U.S. 46, 51 (1955) ("[O]n essentially factual questions the findings of two courts should not ordinarily be disturbed.").

This same principle applies in the administrative context. *See Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 496 (1951) ("[E]vidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusion."); *NLRB* v. *Stor-Rite Metal Prods., Inc.*, 856 F.2d 957, 964 (7th Cir. 1988) (noting that when the NLRB "rejects the findings of the ALJ, a special problem of administrative review arises[,]" and the reviewing court may view the evidence supporting the Board's conclusion as "less substantial than it would be if the Board and the ALJ had reached the same conclusion") (internal citations and quotation marks omitted); *Simon* v. *Simmons Foods, Inc.*, 49 F.3d 386, 389-390 (8th Cir. 1995) ("While much deference is usually accorded to an agency's expertise and discretion when the agency adopts the findings of the ALJ, a slightly different rule applies when the administrative agency rejects the ALJ's findings. An agency departing from the findings of the ALJ must show that it gave attentive consideration to the ALJ's conclusions.") (internal citations omitted).

At bottom, the Tax Court's secreting of the STJ's report offends due process because it is important for an appellate court, in determining the degree of deference to be given to the Tax Court's factual findings, to know whether and why the Tax Court agreed with or rejected the STJ's findings of fact and credibility determinations. If the Tax Court agreed with the STJ's conclusions, appellate review for clear error is

properly deferential. But if the Tax Court rejected the factfinding and credibility determinations of the STJ who actually saw and heard the witnesses, further scrutiny is required on appeal. The Tax Court's refusal to disclose the STJ's report thus impedes the proper exercise of appellate review in violation of the Due Process Clause.

B. The STJ's Report Must Be Disclosed On Appeal Because It Has Legal Effect.

The denial of the STJ's Rule 183 report to an appellate court that is reviewing a decision of the Tax Court cannot be squared with the requirements of due process for the further reason that that report is a document having legal effect.

Rule 183 makes it mandatory for the STJ to produce a report: the STJ "*shall* submit a report, including findings of fact and opinion." Tax Ct. R. 183(b) (emphasis added). The rule then directs that the STJ's findings of fact "shall be presumed to be correct" and that deference—"[d]ue regard"—shall be given to the STJ's evaluation of the credibility of witnesses. Tax Ct. R. 183(c); *see also Freytag*, 501 U.S. at 874 n.3 ("deferential standard" applies to Tax Court review of STJ's factfinding). The Rule 183 report thus is a document that has a legally-operative effect upon the ultimate decision of the Tax Court.

That the Rule 183 report is a document with legal effect is underscored by the fact that STJs are not mere "aides" or "staff" of the Tax Court. Indeed, the powers and duties of STJs place them in an entirely different category from law clerks or other judicial assistants.

In *Freytag*, this Court held that STJs are "inferior Officers" of the United States (U.S. Const. art. II, § 2, cl. 2) who exercise significant governmental authority. *See Freytag*, 501 U.S. at 881. The *Freytag* Court rejected the Commissioner's contrary argument that an STJ "acts only as an aide to the Tax Court judge responsible for deciding the case" and that STJs should be deemed mere employees of the court

"because they lack authority to enter a final decision." *Id.* at 880, 881.

In rejecting that argument, the *Freytag* Court said that the Commissioner had "ignore[d] the significance of the duties and discretion that special trial judges possess." *Id.* The Court observed that "[t]he office of special trial judge is 'established by Law,' Art. II, § 2, cl. 2," and that an STJ's "duties and functions are * * * delineated in a statute." 501 U.S. at 881. The Court also noted that STJs "perform more than mere ministerial tasks. They take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders. In the course of carrying out these important functions, the special trial judges exercise significant discretion." *Id.* at 881-882.

In short, it cannot be consistent with due process for the Tax Court to withhold from a reviewing court of appeals a document that is legally required under Tax Court rules; prepared by a judicial officer vested with significant governmental authority; and having a legal effect upon the Tax Court's decision in the case.

C. *Mathews* v. *Eldridge* Requires Disclosure Of The STJ's Report To An Appellate Court.

As this Court recently confirmed, the test set forth in *Mathews* v. *Eldridge*, *supra*, is "[t]he ordinary mechanism * * * for determining the procedures that are necessary to ensure that a citizen is not 'deprived of life, liberty, or property, without due process of law.' " *Hamdi* v. *Rumsfeld*, 124 S. Ct. 2633, 2646 (2004) (plurality opinion of O'Connor, J.) (quoting the Fifth Amendment); *see also Burns* v. *United States*, 501 U.S. 129, 148 (1991) (Souter, J., dissenting) ("The *Mathews* analysis has thus been used as a general approach for determining the procedures required by due process whenever erroneous governmental action would infringe an individual's protected interest") (citing cases applying *Mathews* in a wide variety of circumstances). The *Mathews* test is properly applied here to determine the

requirements of due process in the tax adjudication context. *See McKesson Corp.*, 496 U.S. at 36 n.17.

Under *Mathews*, three factors are judicially analyzed and balanced to ascertain whether a challenged governmental procedure comports with due process:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. [424 U.S. at 335.]

Here, the application of the *Mathews* test leads to the conclusion that due process requires the disclosure of the STJ's report to a reviewing court of appeals.

The private interests at stake in Tax Court cases are undoubtedly significant. This Court has recognized that, like deprivations of liberty interests, the deprivation of a property interest can be severe. *See*, *e.g.*, *FDIC* v. *Mallen*, 486 U.S. 230, 243 (1988). In this case, Burton Kanter was found liable for civil tax fraud—a judgment that carries enormous pecuniary and other consequences. And that is not just a temporary deprivation; it is a permanent one. *Cf. City of Los Angeles* v. *David*, 538 U.S. 715, 717 (2003) (per curiam).[6]

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[6] The Tax Court's secretive process also has a broader impact upon the Nation's small businesses and economic growth. Small businesses are crucial to the American economy and job creation. There are some 22.4 million small businesses in the United States, representing 99 percent of all employers and creating two-thirds to three-quarters of net new jobs. *See* House of Representatives, Small Business Comm., Small Business Facts, *available at* http://wwwc.house.gov/smbiz/smallBusinessFacts/smallBusinessFacts.asp. When a small business is subjected to erroneous taxation—*i.e.*, the imposition of taxes that the business is not, in fact, obligated to pay—it undermines the viability of the small business. Yet the Tax Court's secretive handling of STJ reports can only

The governmental interest in withholding the STJ's report from a reviewing court of appeals, conversely, is not readily apparent. Tax Court Rule 183 already requires STJs to prepare reports and file them with the Tax Court. The burden of including that document in the record on appeal is negligible. And it is hard to see what legitimate governmental interest could be served by denying the parties and the appellate court access to a document that has independent legal significance.

The remaining *Mathews* factor—the risk of an erroneous deprivation due to the Tax Court's refusal to release the STJ's report—points strongly in favor of releasing such reports on appeal. Appellate review of initial adjudications affecting significant private interests is a defining characteristic of the American legal system because such review is essential to reaching fair and accurate judgments. Accordingly, this Court has recognized the importance of appellate review to obtaining correct adjudications, in both civil and criminal contexts. *See Cooper Indus., Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 n.9 (2001); *Griffin* v. *Illinois*, 351 U.S. 12, 18 (1956) (plurality opinion). And, as shown above, nondisclosure of the STJ's report impairs a court of appeals' ability to review the Tax Court's factfinding. By lifting the veil off these reports, this Court can only improve the accuracy of appellate decision making. *See Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U.S. 123, 171 (1951) (Frankfurter, J., concurring) ("Secrecy is not congenial to truth seeking").

The risk of erroneous deprivation is exemplified in this case by the fact that both of the courts below assumed that the STJ "opinion" adopted by the Tax Court was in fact the STJ's Rule 183 report without any evidence to support this assumption. *See Ballard*, 321 F.3d at 1040 ("Judge Dawson issued the opinion of the Tax Court in which the Tax Court both approved of and adopted Special Trial Judge Couvil-

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discourage small businesses from resorting to the Tax Court to contest erroneous taxation.

lion's *report*.") (emphasis added); *Estate of Kanter*, 337 F.3d at 840-841. An appellate court cannot conduct a meaningful review if it is not sure whether the STJ's report and opinion are one and the same.

D. The Tax Court Stands Alone In Its Secret Process.

Transparency is one of the hallmarks of a fair judicial process. As Justice Frankfurter stated in *McGrath*, 341 U.S. at 170, "fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights." *Accord Connecticut* v. *Doehr*, 501 U.S. 1, 14 (1991). A transparent process is also necessary to ensure public confidence in the integrity of the judicial system. Thus, this Court has stressed that "[o]penness * * * enhances * * * the appearance of fairness so essential to public confidence in the system." *Press-Enterprise Co.* v. *Superior Court of Cal., Riverside County*, 464 U.S. 501, 508 (1984); *see also Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 572 (1980) ("People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.").

The secrecy with which the Tax Court treats the STJ reports undermines the confidence of both the public and the appellate courts that the Tax Court complied with its own rule requiring it to "presume[ ] to be correct" the STJ's findings of fact and to give "[d]ue regard" to the STJ's credibility determinations. Tax Ct. R. 183(c). Disclosure of the STJ report would lend transparency to the Tax Court's process and facilitate appellate review of that court's judgments. As it is, the Tax Court's current secretive procedures cast a shadow over the integrity of its factfinding. The lack of transparency in the Tax Court proceedings invariably and unnecessarily gives rise to speculation about how and why a case was decided as it was.

Not surprisingly, the Tax Court stands alone in refusing to ensure proper appellate review by secreting the reports of initial factfinders. The STJ "acts in a capacity not dissimilar to that of a magistrate in district court." *Estate of Smith* v.

Commissioner, 638 F.2d 665, 669 (3d Cir. 1981). But the reports of magistrate judges, and other similar judicial officers, including bankruptcy judges, special masters, and administrative law judges, must be part of the record on review. *See* 28 U.S.C. § 636(b)(1)(C) ("the magistrate judge shall file his proposed findings and recommendations * * * with the court and a copy shall forthwith be mailed to the parties"); Fed. R. Bankr. P. 9033(a) ("the bankruptcy judge shall file proposed findings of fact and conclusions of law"); Fed. R. Civ. P. 53(e) ("master who makes an order must file the order and promptly serve a copy on each party"); Fed. R. Civ. P. 53(f) (requiring special master to file report and promptly serve on the parties "unless the court directs otherwise"); 5 U.S.C. § 557(c) ("All [preliminary agency] decisions, including initial, recommended, and tentative decisions, are a part of the record * * *."). This Court also provides parties access to the reports of its special masters, to which the parties may make exceptions. *See, e.g., Kansas* v. *Colorado*, 533 U.S. 1, 5-6 (2001); *Colorado* v. *New Mexico*, 467 U.S. 310, 313 (1984).

As the courts of appeals have repeatedly recognized, transparency serves a critical role in the appellate review process. For instance, if the appellate court does not have access to the factual findings of the magistrate judge, it cannot ensure that the district court appropriately performed its review nor can it correctly perform its own clear-error review. *See, e.g., Cooper-Houston* v. *Southern Ry.*, 37 F.3d 603, 604 (11th Cir. 1994) (overruling summary judgment on the ground that the district court was "bound to defer to the factual determinations of the magistrate judge unless those findings were clearly erroneous"); *Shabazz* v. *Askins*, 980 F.2d 1333, 1334-35 (10th Cir. 1992) (finding that the district court abused its discretion in adopting a magistrate's report that incorrectly weighed disputed facts); *Phinney* v. *Wentworth Douglas Hosp.*, 199 F.3d 1, 4 (1st Cir. 1999) (determining that the magistrate's account of the facts was not clearly erroneous and therefore affirming the district court's judgment).

The same need for access to the initial factfinder's report holds true in the review of decisions of bankruptcy judges and administrative law judges. *See, e.g., In re Webb*, 954 F.2d 1102, 1108 (5th Cir. 1992) ("The district court did not properly apply the clearly erroneous standard of review to the findings of the bankruptcy court. Had it done so, it would have concluded, as [d]o we, that the bankruptcy court's findings were plausible, and, therefore, were not clearly erroneous."); *Ewing* v. *NLRB*, 732 F.2d 1117, 1118 (2d Cir. 1984) (overruling decision of NLRB to reverse ALJ's credibility determinations because "[i]t is the task of trial judges to separate factual wheat from evidentiary chaff, and appellate courts must accord great deference to these determinations[,] [and] [t]he same policies apply in the administrative context when decisions of the finder of fact are brought under review").

A constitutionally proper appeal requires an appellate court to be able to review the findings of the STJ—the judicial officer who presided over the trial, observed the witnesses, and made the critical credibility determinations. The Tax Court's refusal to provide a complete record for appellate review and insistence on judicial secrecy violates due process. This Court should condemn that practice—a practice that does not comport with the fair and open process that litigants and the public expect of our judicial institutions.

II. INTERPRETING 26 U.S.C. §§ 7459 AND 7461 TO REQUIRE DISCLOSURE OF THE STJ'S REPORT AVOIDS THE DUE PROCESS ISSUE.

Under this Court's doctrine of constitutional doubt, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *see also Ashwander* v. *TVA*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring); *United States ex rel. Attorney General* v. *Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909) ("[W]here a statute is

susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.").

As shown above, the Tax Court's failure to disclose STJ reports raises a serious due process question. That question can be avoided, however, by interpreting two provisions of the Internal Revenue Code—26 U.S.C. §§ 7459(b) and 7461(a)—to require disclosure of such reports. Section 7461(a) provides that "all reports of the Tax Court * * * shall be public records open to the inspection of the public." And Section 7459(b) states that "[t]he Tax Court shall report in writing all its findings of fact, opinions, and memorandum opinions." These statutes can and should be construed to require disclosure of the STJ's report and thereby avoid the substantial due process issue that would otherwise arise. *Cf. Burns*, 501 U.S. at 138 (avoiding due process problem by construing Fed. R. Crim. P. 32 to prohibit district court from departing upward from Sentencing Guidelines range without providing notice of its intent to do so).

The plain language of both Section 7461(a) and 7459(b) would seem to encompass the STJ reports required by Rule 183 and the contents of those reports. Section 7461(a) makes publicly available all "reports" of the Tax Court. A Rule 183 report clearly is a "report"; indeed, that is the very term used in Rule 183. Section 7459(b), meanwhile, applies to all "findings of fact" and "opinions," and the STJ's report is expressly required to "includ[e] findings of fact and opinion." Tax Ct. R. 183(b). Thus, STJ reports appear to fall squarely within the coverage of these statutes. At the very least, it cannot be said that it would be "plainly contrary to the intent of Congress," *Edward J. DeBartolo Corp.*, 485 U.S. at 575, to construe these statutes so as to avoid the due process problem entailed by withholding STJ reports from a reviewing court of appeals.

CONCLUSION

For the foregoing reasons, the judgments below should be reversed.

Respectfully submitted,

KAREN R. HARNED
ELIZABETH A. GAUDIO
NATIONAL FEDERATION
OF INDEPENDENT BUSINESS
LEGAL FOUNDATION
1201 F Street, N.W.
Suite 200
Washington, D.C. 20004
(202) 554-9000

H. CHRISTOPHER BARTOLOMUCCI
Counsel of Record
STEPHANIE L. BROOKER
JESSICA L. ELLSWORTH
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5810

Counsel for Amicus Curiae